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SUPREME COURT, U.S.
FILED

No. 10-559

IN THE

Supreme Court of the United States

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL

Petitioners,

v.

TIM TUBRA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

BRIEF IN OPPOSITION

CHRISTOPHER LUNDBERG
Counsel of Record
MATTHEW E. MALMSHEIMER
HAGLUND KELLEY JONES
& WILDER LLP
200 SW Market, Suite 1777
Portland, OR 97201
(503) 225-0777
clundberg@hk-law.com

Counsel for Respondent

233166

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Have petitioners presented compelling reasons to grant the petition where: 1) the factual crux of petitioners' argument does not exist (*i.e.* there was no termination nor discipline of a pastor); 2) in order to reach petitioners' argument this Court would be required to ignore the facts in the record and overrule Oregon state law; and 3) the lower courts (including the Oregon Court of Appeals) have consistently applied this Court's First Amendment jurisprudence?

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STATEMENT OF THE CASE

I. Petitioners Present This Case on Facts That Never Existed.

Petitioners misstate the nature of this defamation action by claiming that it arose "from the termination of respondent Tim Tubra" and that it pertains to defamation that occurred "in the course of the church's disciplinary process." Pet. 2. As the record and Petitioners' concessions below conclusively establish, Mr. Tubra was never terminated from the church, nor was he ever subject to any discipline by the church.

Those factual misstatements are the crux of Petitioners' argument. Without them, their position that the First Amendment as interpreted by this Court (and the lower courts following this Court's decisions) necessarily fails. In that regard, Petitioners also misstate the nature of this case when they contend that it pertains solely to the scope of the First Amendment and "does not involve a dispute about the underlying facts." Pet. 3. Petitioners' failure to accurately describe the facts that are critical to this Court's understanding of this case is alone sufficient grounds to deny the petition. Sup. Ct. R. 14.4.

Petitioners also overstate the need for this Court's guidance. While this Court has not ruled on a case presenting identical facts, this Court's First Amendment jurisprudence has provided sufficient guidance to allow the lower courts to develop a consistent body of law. While the lower courts' analytic tests have minor differences in their particulars, the

underlying principles are uniformly in line with this Court's First Amendment jurisprudence. All of the cases protect those church activities that are religious, while holding churches accountable for their secular actions.

Petitioners contend that the First Amendment has been interpreted in conflicting and irreconcilable ways by many state and federal courts. Pet. 21-22. However, the real reason for the differences in the various decisions of the lower courts is the variety of fact patterns presented, not the legal tests or the courts' varying interpretations of the scope of First Amendment protections. In that regard, the Oregon Court of Appeals decision is consistent with the jurisprudence of this Court and the lower courts' decisions that have grown out of that jurisprudence.

II. Statement of the Facts.

Respondent accepts the Court of Appeals statement of facts, *Tubra v. Cooke*, 233 Or. App. 339, 341-46, 225 P.3d 862, *rev. denied*, 348 Or. 621, 237 P.3d 221 (2010). However, in order to clarify the record below and the issues relevant to this Petition, the following facts must be highlighted.

First, Mr. Tubra was never terminated from his position as a pastor of the Foursquare Church. Petitioners' contrary misstatement to this Court is particularly startling given that in all of their pretrial filings, including a Motion for Summary Judgment, and in their motions and argument at trial, Petitioners denied that Mr. Tubra had been terminated. In their Answer, Petitioners denied the sole allegation that they

now claim as their basis for asserting that Mr. Tubra was terminated. Third Am. Compl., ¶ 20; Answer to Second Am. Compl., ¶ 20. In their Motion for Summary Judgment, Petitioners conceded that the conclusion of Mr. Tubra's employment "was *not a termination*, however, but only a following through on the agreed upon time schedule which was made at Mr. Tubra's request." Pet.'s Mot. Summ. J. at 7 (citing Pl's. Dep. Ex. 11) (attached as Appendix) (emphasis added). According to Petitioners, as of September 29, 2004 – two weeks after Mr. Tubra's term at the Vernonia Church had come to its natural conclusion – "he could still [have been] serving there if he had so chosen." *Id.*

This is consistent with the evidence presented at trial, which established that Mr. Tubra's position at the Vernonia Church was temporary and that, at the conclusion of that temporary position, he was transitioned out after Petitioners had found a suitable replacement. Tr. 116, 131-32, 163 and 181. Petitioners conceded this fact at trial, noting that Mr. Tubra was not "out right away" after they had found his replacement and that the case involved Mr. Tubra "leaving his church." Tr. 7 and 79. Petitioner Swor similarly testified that Mr. Tubra's pastoral license was suspended "after he *left his appointment*" at the Vernonia Church because, without an appointment, a pastor's license is suspended as a matter of course. Tr. 284 (emphasis added). Plainly, as shown by the evidence presented at trial and Petitioners' concessions, Mr. Tubra was not terminated from his employment with the Foursquare Church.

Second, Mr. Tubra was never subject to any sort of disciplinary proceeding by Petitioners. As Petitioner Cooke admitted at trial, when the defamatory letter was published, it was not in the context of an investigation of Mr. Tubra's actions as pastor. Tr. 406-07. Further, as noted above, Mr. Tubra's pastoral license was suspended not because he had engaged in any wrongdoing or was facing any discipline by the church, but simply because he had not sought a new appointment with the Church and, as a matter of course, a pastoral license is suspended when the pastor is not in an active pastoral position. Tr. 284. Mr. Tubra was not subject to any discipline by the Foursquare Church.

Finally, Petitioners defamed Mr. Tubra well after his term at the Vernonia Church had come to its natural conclusion. Petitioners first defamed Mr. Tubra on October 27, 2004 – six weeks after his term had come to its natural conclusion. Tr. 131-32; 181-82; Pets.' Ex. 121. Petitioner Cooke next defamed Mr. Tubra on November 30 – two and a half months after that term had concluded. Tr. 215-16, 275. Thus, when Petitioners defamed Mr. Tubra, he was no longer employed by the church and accordingly not subject to its ecclesiastical authority.

REASONS FOR DENYING THE PETITION

I. The Record Below Does Not Raise the Question Presented by Petitioners.

Petitioners frame the question presented to this Court as whether the First Amendment bars Respondent's claim where it is "based entirely on statements made . . . explaining . . . why the church disciplined and terminated the pastor." Pet. at (i). That question, however, is not raised by this case because, as set forth above, Mr. Tubra was never terminated or subject to any disciplinary action by the Church. Petitioners' entire argument hinges on those factual misstatements, which are contrary to the evidence at trial and Petitioners' concessions throughout the litigation of this case.

A review of Petitioners' defamatory letter confirms both that Mr. Tubra was never terminated or disciplined and that Petitioners' have presented this Court with a question not raised by this case. Nowhere in that letter do Petitioners "explain[ ] . . . why the church disciplined and terminated the pastor." That letter does not say a single word about either discipline or termination. Pets.' Appendix F. It does no more than falsely accuse Mr. Tubra of "a financial misappropriation," purportedly only for the "sake of the record, and to clear up any misunderstandings." *Id.*, ¶ 2.

Before this Court, petitioners are bound by their concessions and assertions in the Court below. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of Law v. Martinez*, ___ U.S. ___, 130 S.

Ct. 2971, 3005 (June 28, 2010) (Alito, J., dissenting) (recognizing that "[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.") (quoting *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)). Furthermore, under Oregon state law, because petitioners successfully relied upon the fact that they never terminated Mr. Tubra's employment in a proceeding before the Employment Department, they cannot assert the contrary position in Mr. Tubra's defamation action. *Day v. Advanced M & D Sales, Inc.*, 336 Or. 511, 524, 86 P.3d 678 (2004); *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 609, 892 P.2d 683 (1995).

Thus, in order to reach the question presented by Petitioners, this Court would have to ignore the evidence and Petitioners' concessions below. Petitioners failed to accurately present this Court with those facts and concessions, which lie at the heart of their Petition. That failure alone is sufficient to deny the petition. Sup. Ct. R. 14.4.

II. In Order to Reach the Question Presented by Petitioners, This Court Would Have to Overrule Oregon State Law.

Petitioners cite to two sources for their contention that Mr. Tubra was terminated. The first is an allegation in the Third Amended Complaint which states that, after a September 15 meeting with Mr. Tubra, Petitioners "dismissed plaintiff from his position." Third Am. Compl., ¶ 20. The second is a conversation between Mr. Tubra and Ron Swor's secretary in which Mr. Tubra was

informed that he was "done" at Vernonia. Tr. 134. However, neither of those sources assists Petitioners. Under Oregon law, the Third Amended Complaint had no operative effect after the close of plaintiff's case-in-chief and, to the extent that Mr. Tubra's testimony about his conversation with Mr. Swor's secretary conflicts with the other evidence at trial, that conflict must be resolved in Mr. Tubra's favor.

Under Oregon law, evidence presented and argued at trial becomes the pleadings, whether or not a party makes a motion to amend. Or. R. Civ. P. 23 B; *Whinston v. Kaiser Found. Hosp.*, 309 Or. 350, 355, 788 P.2d 428 (1990), *overruled on other grounds, Shoup v. Wal-Mart Stores, Inc.*, 335 Or. 164, 174, 61 P.3d 928 (2003). However, to ensure that the amendment was express, at the close of evidence, plaintiff moved to amend the pleadings to conform to the evidence presented at trial. Tr. 503-504. Defendants did not object, and the trial court granted the motion. *Id.* at 504. Thus, once plaintiff closed his case-in-chief and the trial court granted plaintiff's motion to amend, the evidence presented at trial became the operative pleading, and the Third Amended Complaint ceased to have any operative effect. *Rodriguez ex rel. Rodriguez v. The Holland, Inc.*, 328 Or. 440, 445-46, 980 P.2d 672 (1999).

In addition, under Oregon law, reviewing courts are required to resolve any conflicts in the evidence and give the benefit of all inferences in favor of the prevailing party. *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968). In this case, that is Mr. Tubra. Pets.' App. E. Thus, either as a matter of beneficial inference or a resolution of conflicting evidence, the evidence established that Mr. Tubra was never terminated.

Petitioners place such heavy reliance on the Third Amended Complaint and the phone call from Mr. Swor's secretary because it is the only way that they can take the position that Mr. Tubra was terminated or otherwise disciplined. However, as set forth above, there was no evidence of either, and Petitioners have admitted so. Thus, in order to reach the Question Presented by Petitioners, this Court would not only have to ignore the facts of the case and Petitioners' concessions below, it would also have to overrule or ignore Oregon state law. As with their misstatement of the facts, Petitioners' failure to accurately present this Court with the procedural posture of this case is alone sufficient to deny the petition. Sup. Ct. R. 14.4.

III. This Court has Provided Clear Guidance to the Lower Courts Regarding the Scope of the First Amendment Protections for Churches in Disputes with Their Ministerial Employees.

Petitioners would have this Court believe that the First Amendment protects them from any civil court review, contending that the courts lack "subject matter" jurisdiction over civil actions that pertain to the actions of a minister while he served with a church. Pet. at 24-25. Petitioners seek a rule of law that shields them from any civil action involving a pastor, regardless of the nature of the claim, the context within which the action arose, or whether it implicates anything religious. Such a rule would be a vast departure from this Court's First Amendment jurisprudence.

This Court long ago squarely rejected the proposition that it lacked "subject matter" jurisdiction to decide disputes simply because they pertained to ecclesiastical matters, even disputes involving the appointment of church leadership. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 15-16 (1929). Religious organizations "come before [the Court] in the same attitude as other voluntary associations[;] their rights . . . are equally under the protection of the law, and the actions of their members subject to its restraints." *Watson v. Jones*, 80 U.S. 679, 714 (1891). The civil courts do not inhibit the free exercise of religion "merely by opening their doors" to disputes involving a church. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

Indeed, this Court has abandoned the notion that mere procedural involvement of the state in a church's affairs violates the First Amendment. Caroline M. Corbin, ABOVE THE LAW? THE CONSTITUTIONALITY OF THE MINISTERIAL EXEMPTION FROM ANTIDISCRIMINATION LAW, 75 Fordham L. Rev. 1965, 2006-08 (2007). "Interaction between church and state is inevitable" and this Court has "always tolerated some level of involvement between the two." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In order to be unconstitutional, such interaction must be "excessive." *Id.*

The mere involvement of a church in a civil action does not amount to "excessive entanglement." Because a civil action is a single interaction between church and state, it does not involve even a minimal level of ongoing supervision or oversight of a church by the state that

this Court has permitted. *Id.* at 233-34 (unannounced monthly visits by public supervisors in parochial schools do not amount to 'excessive entanglement."); *see also Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (ongoing monitoring of federal grants to ensure that funds are not spent for religious purposes permissible); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985) (administrative oversight and record-keeping requirements under FLSA do not amount to "excessive entanglement.").

The fact that a dispute involves a church and a pastor does not affect the jurisdiction of the courts. *Gonzalez*, 280 U.S. at 15-16. Rather, it affects the scope of review, permitting the courts to defer to the church's decisions on "matters purely ecclesiastical" such as "questions of discipline . . . faith, or ecclesiastical rule, custom, or law." *Id.* at 16; *Watson*, 80 U.S. at 727. First Amendment values are only jeopardized where litigation involving the church "is made to turn on the resolution . . . of controversies over religious doctrine and practice." *Serbian Eastern Orthodox Diocese for the United States of Am. and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (quoting *Presbyterian Church*, 393 U.S. at 449). Where no issues of "doctrinal controversy" are involved, the First Amendment does not require a "rule of compulsory deference to religious authority." *Jones v. Wolf*, 443 U.S. 595, 605 (1979). The Courts are free to apply a neutral law of general applicability provided it "involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or tenets of faith." *Id.* at 602.

Consistent with the foregoing, this Court has recognized that the Free Exercise Clause does not shield religious entities from complying with a "valid and neutral law of general applicability." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-80 (1990). Such "neutral law[s] of general applicability" that do not "coerce individuals into acting contrary to their religious beliefs" are valid, even where they have the potential to "virtually destroy" the religious practices of a particular group. *Lyng v. N.W. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-52 (1988). It is only where the law specifically targets religion without a compelling state interest that the free exercise clause is violated. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993).

Petitioners contend that, in this case, the free exercise rights of the church as an institution are at issue and are accordingly entitled to greater protection than those of the individual practitioners in *Smith*. Pet. at 27-28. However, that would place the "professed doctrines" of the church "superior to the law of the land," making the church a "law unto [it]self," something that *Smith* specifically held the First Amendment was never intended to do. 494 U.S. at 879. Petitioners also contend that this Court has provided insufficient guidance as to the scope of the First Amendment protections afforded to churches in handling their own internal ecclesiastical affairs and concerns. Pet. at 11-22. However, as set forth above, this Court has provided consistent and reliable guidance on that issue. As described more fully below, this Court's guidance has led the lower courts to develop a consistent body of law. Thus, even if the facts of this case supported the

question framed by Petitioners, this Court's jurisprudence has already provided the appropriate guidance to the lower courts in answering that question. Accordingly, Petitioners have failed to provide a compelling reason to grant the Petition. Sup. Ct. R. 10(c).

IV. There is No Split in Legal Authority Among the Lower Courts; the Diversity of Results Reflects Only the Diversity of Facts Before the Courts.

Petitioners contend that there is a split in the lower courts pertaining to "the First Amendment rights of religious institutions to discipline their own clergy without having those decisions second-guessed by secular courts." Pet. at 11. According to Petitioners, this is due to the "absence of definitive guidance by this Court." *Id.* However, Petitioners misidentify the source of the division in the lower courts and overstate the need for additional guidance from this Court.

This Court has provided clear guidance on the scope of First Amendment protections. The decisions of the lower courts, while admittedly applying different specific tests, all decide the issue using the principles announced in this Court's decisions. In short, the various tests all protect that which is religious, while recognizing that churches may be held accountable for their secular actions.

The reason for the apparent "split of authority" is not an inconsistent application of First Amendment principles. Rather, it results from the different facts before each court. For example, the overwhelming

majority of decisions cited by petitioners for their "robust" application of the First Amendment, Pet. at 15-17, arose in the context of a termination.[1] The other cases relied on by Petitioners uniformly arose either out of some other ecclesiastical function, such as a disciplinary proceeding,[2] or some other context in which the courts were required to review the church's assessment of a plaintiff's pastoral qualifications or suitability to remain in the church.[3]

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[1] *Heard v. Johnson*, 810 A.2d 871 (D.C. 2002); *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002); *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. App. 1989) *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990); *Brady v. Pace*, 108 S.W.3d 54 (Mo. App. 2003); *Patton v. Jones*, 212 S.W.3d 541 (Tex. App. 2006), *rev. denied* (Tex. January 12, 2007); *Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005), *rev. denied*, 2006 WL 2590062 (Colo. 2006); *Yaggie v. Indiana-Kentucky Synod*, 860 F. Supp. 1194 (W.D. Ky.1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. App. 1998), *cert. denied*, 528 U.S. 1075 (2000); *Jeambey v. The Synod of Lakes and Prairies*, No. CX-95-902, 1995 WL 619814 (Minn. App. Oct. 24, 1995); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*,714 N.E.2d 253 (Ind.App.1999).

[2] *Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp. 2d 552 (W.D. N.C. 2002); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002); *Ogle v. Church of God*, 153 Fed. Appx. 371 (6th Cir. 2005); *Stepek v. Doe*, 910 N.E.2d 655 (Ill. App.), *rev. denied*, 919 N.E.2d 366 (Ill. 2009); *Trice v. Burress*, 137 P.3d 1253 (Okla. App. 2006).

[3] *Schoenhals v. Mains*, 504 N.W.2d 233 (Minn. App. 1993); *Bourne v. Center on Children, Inc.*, 838 A.2d 371 (Md. App. 2003), *rev. denied*, 846 A.2d 401 (Md. 2004); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. App. 1996);

Conversely, where, as here, a civil action does not arise in the context of a termination or other disciplinary proceeding, and where the claims do not require the courts to review the church's assessment of a plaintiff's religious qualifications, the courts have recognized that a church's First Amendment rights are not jeopardized by such action. For example, in *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 469-72 (8th Cir. 1993), the Eighth Circuit Court of Appeals allowed a pastor's claim for libel to proceed against the Lutheran Church based on the church's circulation of a false allegation that the pastor's wife had previously been married. Such information, if true, would lead any church within the Synod to automatically pass over the pastor. *Id.* at 470. Relying on this Court's decision in *Milivojevich, supra*, the Eighth Circuit held that the claim was not barred by the First Amendment. *Id.* at 471-72. The Eighth Circuit reasoned that the question of the pastor's fitness to serve was not at issue, and the church had provided no "religious explanation for its actions which might entangle the court in a religious controversy." *Id.* at 472.

Drevlow does not stand alone. Consistent with, and in reliance on, this Court's decisions, where the lower courts can avoid engaging in a review of doctrinal matters or becoming involved in an ecclesiastical dispute, they hold that a pastor's claim against the

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Thibodeau v. Am. Baptist Churches of Connecticut, 994 A.2d 212 (Conn. App.) *rev. denied*, 3 A.3d 74 (Conn. 2010); *Reynolds v. Wood*, 998 So.2d 1058 (Ala. App. 2007), *rev. denied* (Ala. June 20, 2008); *Jackson v. Presbytery of Susquehanna Valley*, 697 N.Y.S.2d 26 (N.Y. App. 1999); *In re Godwin*, 293 S.W.3d 742 (Tex.App. 2009).

church is not barred by the First Amendment.[4] This is true in cases where, even if the Court is required to decide an arguably ecclesiastical matter, the church's actions have gone beyond the scope of the First Amendment protections – in other words, where the church's actions are non-religious.[5] Importantly, many of the cases relied on by Petitioners also recognize that the First Amendment will not shield a church's actions from civil court review under facts that do not require the resolution of religious controversies or where the church exceeds the scope of the First Amendment's religious protections.[6]

Petitioners' contention that there is a split in authority among the lower courts is wrong. As set forth above, the legal principles announced by this Court have been faithfully applied by the lower courts. The variety of results is indicative of the broad array of facts presented to these courts, not any inconsistent application of this Court's First Amendment

[4] *E.g.*, *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), *cert. denied*, 474 U.S. 1013 (1985); *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084 (Pa. 2009); *Calvary Christian School, Inc. v. Huffstuttler*, 238 S.W.3d 58 (Ark. 2006); *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993); *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991); *Ogle v. Hocker*, 279 Fed.Appx. 391 (6th Cir. 2008).

[5] *Gorman v. Swaggart*, 524 So.2d 915, 921-23 (La. App.), *rev. denied*, 530 So.2d 571-75 (La. 1988), *cert. denied*, 489 U.S. 1017 (1989).

[6] *Schoenhals*, 504 N.W.2d at 235; *Seefried*, 148 P.3d at 189-90; *Heard*, 810 A.2d at 884-85; *Higgins*, 258 Cal. Rptr. at 761; *Hutchison*, 789 F.2d at 395-96; *Hiles*, 773 N.E.2d at 935-37; *Jeambey*, 1995 WL 619814 at *2; *Reynolds*, 998 So.2d at 1060 n.1; *Stepek*, 910 N.E.2d at 668-69; *Downs*, 683 A.2d at 812-13.

jurisprudence. It is thus not surprising that this Court has denied petitions for certiorari on every one of the decisions cited by both parties where Supreme Court review was sought.[7] Accordingly, Petitioners have failed to present a compelling reason to grant the petition. Sup. Ct. R. 10 (c).

V. The Oregon Court Of Appeals Announced The Correct Rule Of Law.

The Oregon Court of Appeals' decision in *Tubra* is consistent with, and relies upon, this Court's First Amendment jurisprudence. *Tubra*, 233 Or. App. at 350-56. The focus of the test described in *Tubra* is whether the conduct at issue is religious, asking whether "alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious." *Id.* at 357. In other words, the test in *Tubra* focuses on whether the controversy is one that can be resolved "without extensive inquiry by civil courts into religious law and polity." *Milivojevich*, 426 U.S. at 709. If religion is specifically targeted by Oregon's defamation law because the conduct at issue is "always and in every context" religious, then a defendant church is entitled to an absolute privilege as a matter of law. *Tubra*, 233 Or. App. at 357. In contrast, where, as in this case, the conduct at issue is susceptible to a number of interpretations, the question of the

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[7] *Alberts*, 479 N.E.2d 113, *cert. denied*, 474 U.S. 1013 (1985); *Hutchison*, 789 F.2d 392, *cert. denied*, 479 U.S. 885 (1986); *Gorman*, 524 So.2d 915, *cert. denied*, 484 U.S. 1017 (1989); *Higgins*, 258 Cal. Rptr. 757, *cert. denied*, 493 U.S. 1080 (1990); *Goodman*, 712 So.2d 775, *cert. denied*, 528 U.S. 1075 (2000); *Cha*, 553 S.E.2d 511, *cert. denied*, 535 U.S. 1035 (2002).

religious nature of the activity is to be resolved by the fact finder. *Id.*

Not only is this rule consistent with this Court's First Amendment jurisprudence, it also comports with the general principle found in the religion clauses that the State must remain essentially neutral towards religion. Conversely, the rule urged by petitioners would "make available the coercive powers of civil courts to rubber-stamp" the decisions of a religious organization, even where such decisions have no relation to the religious goals, doctrine, or practices of the body in question. *Milivojevich*, 426 U.S. at 734 (Rehnquist, J., dissenting). As Justice Rehnquist noted, granting such deference to religious institutions, while not providing it to similar secular groups, would "in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause." *Id.*

The Oregon Court of Appeals decision in *Tubra* avoids targeting religion, while ensuring that the courts not lend their power to the establishment of any particular religion. Given the foregoing, it is not surprising that this Court has previously denied review of the identical rule, albeit where the conduct at issue was the fraudulent recruitment of new members rather than the defamation of a former pastor. *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, *rev. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied.*, 459 U.S. 1206, 459 U.S. 1227 (1983).

CONCLUSION

For the reasons set forth above, and in accordance with Supreme Court Rules 10(a)-(c) and 14.4, the Petition should be denied.

Respectfully submitted,

CHRISTOPHER LUNDBERG
Counsel of Record
MATTHEW E. MALMSHEIMER
HAGLUND KELLEY JONES
& WILDER LLP
200 SW Market, Suite 1777
Portland, OR 97201
(503) 225-0777
clundberg@hk-law.com

Counsel for Respondent